No. 75-104

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., ET AL., PETITIONERS

v.

HUGH L. CAREY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-50a) is reported at 510 F.2d 512. The opinion of the district court (Pet. App. 53a-58a) is reported at 377 F. Supp. 1164.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5a-6a) was entered on January 6, 1975, and a timely petition for rehearing and suggestion for rehearing *en banc* was denied on Fedruary 27, 1975 (Pet. App. 4a). On June 25, 1975, Mr. Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including July 18, 1975 (Pet. App. 1a-2a). The petition was filed on July 17, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below correctly held that the redistricting law enacted by the State of New York in 1974 for Kings County does not illegally dilute petitioners' voting strength.

STATEMENT

The New York counties of Bronx, Kings and New York are subject to the provisions of the Voting Rights Act of 1965 (the "Act"), as amended, 42 U.S.C. 1973 *et seq.*, by virtue of the Attorney General's determination that on November 1, 1968, the State of New York maintained a test or device (a literacy test) within the meaning of Section 4(c), 42 U.S.C. 1973b(c),[1] and the determination of the Bureau of the Census that less than fifty percent of the voting-age residents of those counties voted in the presidential election of 1968.[2] Thus, before the State of New York could effect changes in district lines in Bronx, Kings and New York counties, it was required to comply with Section 5 of the Act, 42 U.S.C. 1973c.[3]

[1]See 35 Fed. Reg. 12354 (July 31, 1970).

[2]See 36 Fed. Reg. 5809 (March 26, 1971).

[3]The State of New York filed suit for a declaratory judgment on behalf of the affected counties on December 3, 1971, asserting that during the ten years preceding the filing of the suit, the voter qualifications prescribed in the New York laws did not deny or abridge the right to vote of any individual on account of race or color and seeking an exemption from coverage under the Act (Pet. App. 12a-13a). See Section 4(a), 42 U.S.C. 1973b(a). On April 13, 1972, the District Court for the District of Columbia entered a declaratory judgment for plaintiff, with the acquiescence of the United States, thereby relieving the three counties of any obligation to comply with the provisions of

On January 31, 1974, the State submitted the redistricting plans enacted in 1972 for Bronx, Kings and New York counties to the Attorney General for review under Section 5 of the Act. The Attorney General objected to certain provisions of those plans on April 1, 1974, advising the New York Attorney General's office (Pet. 3):

> On the basis of all the available demographic facts and comments received on these submissions as well as the state's legal burden of proving that the submitted plans have neither the purpose nor the effect of abridging the right to vote because of the race or color, we have concluded that the proscribed effect may exist in parts of the plans in Kings and New York Counties.

The letter of objection stated that the provisions contained in the plans for election to the state senate and assembly from Kings County failed to comply with Section 5 because one of the districts provided for in the plans had an "abnormally high minority concentration while adjoining minority neighborhoods [were] significantly diffused into surrounding districts, * * * [and we know]

the Voting Rights Act (Pet. App. 13a). *New York State* v. *United States*, Civil No. 2419-71 (unreported).

Subsequently, as a result of the decision of the District Court for the Southern District of New York in *Torres* v. *Sachs*, 73 Civ. 3921 (September 26, 1973) (unreported), which held that the conduct of elections in the City of New York solely in the English language violated the rights of non-English speaking Puerto Rican citizens, the United States moved in the District Court for the District of Columbia to reopen the declaratory judgment of April 13, 1972. On November 5, 1973, the motion to reopen was granted, and on January 10, 1974, the declaratory judgment was rescinded. On April 30, 1974, the State's motion for summary judgment was denied. This Court summarily affirmed the 1974 orders. *New York on behalf of New York County* v. *United States*, 419 U.S. 888. (See Pet App. 13a.)

of no necessity for such configuration and believe * * * other rational alternatives exist" (Pet. 3-4).[4] Under Section 5 of the Act, 42 U.S.C. 1973c, the State of New York could have brought an action before a three-judge court in the District of Columbia challenging the basis of the Attorney General's objections. See *Allen* v. *State Board of Elections*, 393 U.S. 544. However, no such action was brought.

Following receipt of the Attorney General's objections, the State revised those portions of the 1972 redistricting plans to which the Attorney General had objected—including those provisions contained in the plans for elections to the state senate and assembly from King's County, which are the subject of this litigation. Laws of New York, chs. 588-591, 599 (1974). Petitioners, who purport to represent the Hasidic community of the Williamsburgh area of Brooklyn (Kings County), brought this suit on June 11, 1974, seeking to enjoin implementation of those provisions in the 1974 redistricting plans relating to state senate and assembly elections from Kings County. They alleged that the disputed provisions in the Kings County redistricting plans violated their rights under the Fourteenth and Fifteenth Amendments by dividing their community between two senate and assembly districts. They further alleged that they had been assigned to districts solely on the basis of race, in violation of the Fifteenth Amendment and Section 2 of the Voting Rights Act, 42 U.S.C. 1973. Petitioners also

[4]The Attorney General also objected to certain provisions for congressional redistricting in Kings County and to portions of the redistricting plans for New York County. Since peitioners presently seek relief only with respect to the state senate and assembly redistricting plans for Kings County, however, those additional redistricting provisions are not at issue here.

sought a declaration that in objecting to portions of the 1972 redistricting plans, the Attorney General had applied impermissible standards. On July 1, 1974, the Attorney General entered his decision not to object to the 1974 redistricting plans (Pet. App. 6-7, and n. 2).

The district court dismissed the suit on July 25, 1974, holding that once the Attorney General had informed the State of New York that he would not object to implementation of the 1974 redistricting provisions challenged by petitioners, no controversy remained under Section 5 of the Voting Rights Act and that petitioners' constitutional challenges were without merit. The court stated that petitioners enjoyed no constitutional right to separate community recognition, that state officials may take into account the racial impact of alternative redistricting schemes in an effort to correct past racial discrimination and that "no one is being disenfranchised by the redistricting [at issue here] and no voting right is being extinguished" (Pet. App. 58a).

The court of appeals affirmed, holding that the complaint against the Attorney General must be dismissed because the district court was without jurisdiction to review the Attorney General's objections to the 1972 plans and no relief was sought against the Attorney General except a declaration that he had applied impermissible standards in objecting to those plans (Pet. App. 20a-22a). As to the state defendants, the court of appeals held that petitioners had failed to prove that their constitutional rights had been violated (*id.* at 22a-24a). As Hasidic Jews, petitioners presented no cognizable claim to remain together as a voting bloc. The court held (*id.* at 24a-26a) that petitioners did have standing to contend, as white voters, that racial considerations cannot be used in drawing district lines. The court concluded (*id.* at 27a-28a), however, that petitioners had failed to show that the effect of the

disputed 1974 redistricting provisions was to reduce the voting strength of white voters in Kings County as a whole or even in the particular districts in which petitioners resided.

ARGUMENT

1. The court of appeals was correct in dismissing the Attorney General of the United States as a party to this case. Indeed, petitioners do not challenge the dismissal. Jurisdiction to review the Attorney General's objections to the 1972 redistricting plans is vested exclusively in the District Court for the District of Columbia under Section 5 of the Act, 42 U.S.C. 1973c, and then only at the behest of the State of New York or a political subdivision. *Allen* v. *State Board of Elections*, 393 U.S. 544, 555, 561. Once the Attorney General had decided not to object to implementation of the disputed 1974 redistricting provisions, moreover, the requirements of the Voting Rights Act were satisfied, and the courts below were foreclosed from determining whether the Attorney General had correctly determined under the Act that the redistricting did not have the purpose or effect of denying or abridging the right to vote on account of race or color. *Perkins* v. *Matthews*, 400 U.S. 379, 386.

2. Contrary to petitioners' contention (Pet. 2), this case does not present the question—

> [w]hether such a gerrymander [the disputed 1974 redistricting provisions] was rendered constitutional by the fact that it was carried out under the instructions of the United States Department of Justice, purporting to implement the Voting Rights Act of 1965.

In objecting to the 1972 redistricting plans, the Attorney General determined that certain of the provisions contained therein would have had the effect of abridging the right to vote on account of race or

color. He did not suggest alternative provisions or plans, and the 1974 lines were not drawn at his direction or pursuant to his instructions.[5] If the State of New York had not enacted in 1974 redistricting provisions not objected to under Section 5 of the Voting Rights Act, the districting provisions in effect prior to 1972 would have remained in effect. As the Attorney General noted in his memorandum of July 1, 1974 (Pet. App. 36a-37a):

> In assessing these arguments [against the provisions of the 1974 plans challenged by petitioners], two basic principles should be kept in mind. First, it is not the function or authority of the Attorney General under Section 5 to devise redistricting plans, or for that matter to dictate to the State of New York specific actions, steps or lines with respect to its own redistricting plan. The only function of the Attorney General under Section 5 is to evaluate a voting change, such as that encompassed in the instant submission, once it has been adopted by the state and submitted for the Attorney General's review, and to determine the limited question of whether the purpose or effect of the change in question is to deny or abridge the right to vote

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[5]Richard S. Scolaro, Executive Director of the State's Joint Legislative Committee on Reapportionment, testified that from discussions with Department of Justice personnel he "got the feeling * * * that 65 percent would be probably an approved figure [for the percentage of non-white population in the assembly district which, under the 1972 plans, was 61.5 percent non-white]" (Pet. 5). Scolaro also testified, however, that no specific figure was either suggested or explicitly approved by the Department of Justice prior to the State's second formal submission (Pet. App. 16a), and there is no testimony that Department of Justice personnel suggested that any particular geographic lines be drawn within Kings County.

> on account of race or color. If no such abridgment or denial exists, the Attorney General must not object to the plan, regardless of the merits or demerits of the plan in other regards, including state, local, and partisan political ones. If an abridgment or denial does exist—as we found in the first submission by New York—the Attorney General must object, stating his reasons, but not drawing a counter plan or commanding any particular state response.

Although the court of appeals correctly stated that the 1974 redistricting was in conformity with the "unchallenged directive" of the Attorney General and with his "approval" (Pet. App. 31a-32a), the "unchallenged directive" was the Attorney General's determination (unchallenged by the State of New York in a declaratory judgment action before a three-judge court, as provided for in Section 5) that certain provisions of the 1972 redistricting could not be enforced and the "approval" was the Attorney General's *post hoc* decision not to object to the redistricting provisions enacted in 1974. The Attorney General did not instruct the State to revise any of the district lines in effect prior to 1972 or, in effecting changes, to adopt any particular new plan or plans with prescribed characteristics. In entering no objection to the 1974 plans, he merely found the plans not to be in violation of the Voting Rights Act.

3. The court of appeals correctly held that petitioners, as Hasidic Jews, do not enjoy a constitutional right to separate community recognition in legislative districting. No court can give effect to each of the community interests that thrive in Kings County.[6] See *Wells* v.

[6]As the court of appeals noted (Pet. App. 23a), there are from twenty to sixty clearly defined communities in Kings County. In view of the fact that there are fewer than nine senate districts and twenty-two assembly districts in the county, it would be impossible to give effect to each community interest.

Rockefeller, 281 F. Supp. 821, 825 (S.D. N.Y.), reversed on other grounds, 394 U.S. 542. Petitioners have not claimed, moreover, that the purpose of the 1974 redistricting was to dilute or abridge their right to vote as Hasidic Jews. As noted by the court of appeals (Pet. App. 24a):

> Rather their complaint is that the purpose [of the 1974 redistricting] was to ensure nonwhite majority representation in the districts in question. Their argument that this purpose was unconstitutional is unchanged whether the *Hasidim* were included in one district or two.

Petitioners also failed to show that their constitutional rights as white voters had been abridged. As the court of appeals noted (Pet. App. 27a-28a, n. 21), the population of Kings County is 64.9 percent white and 35.1 percent non-white (*i.e.*, black and Puerto Rican). Under the disputed redistricting provisions enacted in 1974, three of King County's ten senate districts contain non-white population majorities. Thus, white voters have voting majorities in 70 percent of the senatorial districts—a figure slightly greater than their numbers represent in the county as a whole. Similarly, only seven of the county's twenty-two assembly districts contain non-white population majorities under the 1974 redistricting provisions. The other fifteen districts (68 percent of the total number of districts) contain white population majorities.

Thus, petitioners have not only failed to show that the 1974 redistricting was "conceived or operated as a pur-

poseful device to further racial discrimination,"[7] *Whitcomb* v. *Chavis*, 403 U.S. 124, 149, but they have also failed to prove that the effect of the 1974 redistricting is to dilute their voting strength as white voters.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1975.

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[7] In contending that the districts provided for in 1974 for elections to the state senate and assembly in Kings County are invalid because they were drawn along racial lines, petitioners fail to recognize that the State of New York was required by the Voting Rights Act to prove the absence of a racially discriminatory effect prior to implementing any changes in the existing lines. Thus, the state defendants could not close their eyes to race. Such race consciousness, however, is not equivalent to invidious racial discrimination. See *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46.